Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-430 OF 2001
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
8 APRIL 2002

Civil Procedure *— Action — Discontinuance of — Guidelines act as beacons when judge exercising discretion to permit discontinuance — What constitutes an advanced stage depends on the facts and circumstances of each case — Whether judge when using discretion to permit discontinuance followed guidelines which depended on the facts and circumstances of each case — Rules of High Court 1980 O 21 r 3*

The plaintiff (the respondent before us) brought an action in the High Court of Kuala Lumpur. In it, he claimed a number of declarations. They were all directed at a meeting of the third defendant which the defendants (the appellants before us) intended to convene for the purpose of discussing certain allegations relating to the judiciary which they considered matters of public interest. The plaintiff stopped that meeting by means of an interlocutory injunction. Later, a trial took place before the learned judge in the High Court. At the close of the proceedings, the learned judge reserved judgment. Later, on a date fixed for mention of the case, the learned judge made a statement indicating that the parties should resolve the differences between them. The plaintiff then made an application to discontinue the suit. That application came up for hearing before the learned judge. It was strenuously opposed by counsel appearing for the defendants. The learned judge permitted discontinuance. The defendants have appealed to this court.

Held, allowing the appeal:

(1) A judge exercising his power under O 21 r 3 of the Rules of High Court 1980 ('the RHC'), which permits discontinuance has a wide discretion. But it is not an unprincipled discretion. There are important guidelines that act as beacons (see p 161G).

(2) One of these guidelines is that if a defendant is *dominus litis*, the general rule is to refuse leave to discontinue: *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124. Another guideline is that where the case is at a very advanced stage, care should be taken not to permit discontinuance. And what constitutes an advanced stage depends on the facts and circumstances of each case as illustrated by the case of *Fox v Star Newspaper Company* [1898] 1 QB 636. Another consideration; which a judge ought to bear in mind is any interim or interlocutory advantage that the plaintiff may have gained between the date of issue of the writ and the point of time which he seeks to discontinue: *O'Neal v Mann* [2000] FCA 1680. The upshot is that it all depends on the facts and circumstances of each

case bearing in mind that one ought not to depart from the outer parameters established by the guidelines to which have been referred (see pp 161H–162A). A

(3) On the facts, the defendants were put to great expense and trouble to test the rights of the plaintiff/respondent to bring the action in the first place. They suffered an order of costs against them at every stage. They came back to the trial court and opposed the granting of the trial of the preliminary issue. They lost there as well. They fought on the facts and law at the trial of the preliminary issue tooth and nail. They never relented. To be then told after undergoing all this trouble that they are not entitled to have judgment delivered, not to know their ultimate fate, is adding insult to serious injury (see p 162F–G). B C

(4) What the learned judge did was to take into account a policy consideration, namely that the hands at the helm of the judicial vessel had changed and that the issue was no longer available for discussion save at an academic level. That is an irrelevant consideration. Here, the court concerned with the legal and constitutional rights of ordinary litigants. There is nothing extraordinary or special in this case so far as the exercise of discretion under O 21 r 3 of the RHC is concerned (see pp 162H–163A). D E

[Bahasa Malaysia summary

Plaintif (responden yang di hadapan kami) telah memulakan satu tindakan di Mahkamah Tinggi di Kuala Lumpur. Di dalamnya, beliau telah menuntut beberapa deklarasi. Kesemuanya menghala kepada satu mesyuarat defendan ketiga di mana defendan-defendan (perayu-perayu di hadapan kami) telah berniat untuk bersidang bagi tujuan membincangkan beberapa pengataan berhubung kehakiman yang mereka anggap adalah perkara-perkara berkaitan kepentingan awam. Plaintif telah menghentikan mesyuarat tersebut melalui satu injunksi interlokutori. Berikutan itu, satu perbicaraan telah diadakan di hadapan hakim yang bijaksana di Mahkamah Tinggi. Di penutup prosiding tersebut, hakim yang bijaksana telah menangguhkan penghakiman. Kemudian, pada satu tarikh yang ditetapkan untuk sebutan kes tersebut, hakim yang bijaksana telah membuat satu kenyataan yang menunjukkan bahawa pihak-pihak tersebut sepatutnya menyelesaikan perbezaan antara mereka. Plaintif kemudian telah membuat satu permohonan untuk menghentikan guaman tersebut. Permohonan tersebut telah didengar di hadapan hakim yang bijaksana. Ia telah dibangkang secukupnya oleh peguam yang mewakili bagi pihak defendan-defendan. Hakim yang bijaksana telah membenarkan penghentian tersebut. Defendan-defendan telah membuat rayuan kepada mahkamah ini. F G H I

Diputuskan, membenarkan rayuan tersebut:

(1) Seorang hakim yang menggunakan kuasa beliau di bawah A 21 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT tersebut'), yang membenarkan penghentian mempunyai budi bicara yang luas. Tetapi ia bukan budi bicara yang tidak berprinsip. Terdapat garis-garis panduan yang penting yang bertindak sebagai isyarat (lihat ms 161G).

(2) Salah satu daripada garis panduan tersebut adalah jika seorang defendan itu *dominus litis*, peraturan amnya adalah untuk tidak membenarkan penghentian: *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124. Satu lagi garis panduan adalah di mana kes tersebut di peringkat hampir selesai, sikap berhati-hati perlu diambil untuk tidak membenarkan penghentian. Dan apa yang membentuk satu peringkat hampir selesai bergantung kepada fakta-fakta dan keadaan-keadaan setiap kes sebagaimana yang digambarkan oleh kes *Fox v Star Newspaper Company* [1898] 1 QB 636. Satu lagi pertimbangan; di mana hakim sepatutnya ingat adalah apa-apa kelebihan interim atau interlokutori yang plaintif mungkin perolehi antara tarikh keluaran writ dan pada masa beliau memohon penghentian: *O'Neal v Mann* [2000] FCA 1680. Kesudahannya adalah ia semua bergantung kepada fakta-fakta dan keadaan-keadaan setiap kes dengan mengingati bahawa seseorang itu tidak patut menyimpang daripada parameter luar yang telah diwujudkan oleh garis-garis panduan yang telah dirujuk (lihat ms 161H–162A).

(3) Berdasarkan fakta-fakta tersebut, defendan-defendan terpaksa menanggung perbelanjaan yang besar dan kepayahan untuk menguji hak-hak plaintif/responden demi memulakan tindakan tersebut pada mulanya. Mereka telah mengalami satu perintah kos terhadap mereka di semua peringkat. Mereka telah kembali ke mahkamah perbicaraan dan membangkang kebenaran perbicaraan berhubung persoalan awal tersebut. Mereka juga telah gagal di situ. Mereka telah melawan berdasarkan fakta-fakta dan undang-undang di perbicaraan persoalan awal tersebut bersungguh-sungguh. Mereka tidak pernah berlembut. Untuk diberitahu kemudian selepas melalui semua kepayahan bahawa mereka tidak berhak terhadap penghakiman yang diputuskan, tanpa mengetahui nasib mereka kesudahannya, hanya tambah memburukkan keadaan (lihat ms 162F–G).

(4) Apa yang hakim yang bijaksana lakukan adalah untuk mengambilkira satu polisi pertimbangan, terutamanya di mana teraju kehakiman telah berubah dan bahawa persoalan tersebut tidak lagi wujud untuk perbincangan kecuali di peringkat akademik. Itu adalah satu pertimbangan yang tidak relevan. Di sini, mahkamah mementingkan hak undang-undang dan hak perlembagaan litigan-litigan biasa. Tiada apa-apa yang luar biasa atau istimewa dalam kes ini setakat berkenaan menggunakan budi bicara di bawah A 21 k 3 KMT tersebut (lihat ms 162H–163A).]

Notes

For cases on discontinuance of, action, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 95–99.

Cases referred to

Ambard v A-G for Trinidad & Tobago [1936] AC 322 (refd)
Fox v Star Newspaper Company [1898] 1 QB 636 (refd)
O'Neal v Mann [2000] FCA 1680 (refd)
Overseas Union Finance Ltd v Lim Joo Chong [1971] 2 MLJ 124 (refd)
Wah Bee Construction Engineering v Pembenaan Fungsi Baik Sdn Bhd [1996] 3 CLJ 858 (refd)

Legislation referred to

Federal Constitution arts 10, 127
Rules of the High Court 1980 O 21 r 3

Appeal from: Suit No S2–23–93 of 1999 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (*Christopher Leong and Charmaine Chow* with him) (*Sivananthan*) for the appellants.
DP Vijandran (*DP Vijandran & Assoc*) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): This case has a history. But we are spared from dealing with all of it. So far as this appeal is concerned, the facts fall within a narrow compass.

The plaintiff (the respondent before us) brought an action by writ in the High Court of Kuala Lumpur. In it, he claimed a number of declarations. They were all directed at a meeting of the third defendant which the defendants (the appellants before us) intended to convene for the purpose of discussing certain allegations relating to the judiciary which they considered matters of public interest. The plaintiff stopped that meeting by means of an interlocutory injunction. Later, a trial took place before the learned judge in the High Court. It was on issues framed by the plaintiff that encompassed the justiciability of the whole of the relief he had claimed at the foot of the writ. The judge amended the issues and ordered a trial. Oral evidence was led on both sides with the former President of the first defendant, namely the second defendant, being subjected to cross-examination on his affidavit. After hearing evidence, and at the close of the proceedings, the learned judge reserved judgment. Later, on a date fixed for mention of the case, he made a statement in the following terms:

> Gentlemen of the Bar,
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> In so far as this case is concerned, I have already reached a decision. All it requires is for me to tell you my decision and in the event of an appeal, to write my judgment. But before I pronounce my decision, I take this opportunity to appeal to both sides to reconsider your positions. In addressing the plaintiff, I would urge you to consider the fact that whilst you might have

been motivated by the highest of ideals for having filed this suit, you must be aware that subsequent events have so quickly overtaken your desired aims that they now seem superfluous. Let's face it. The *raison d'etre* for your filing this suit, namely the allegations against YAA Tun Eusoff bin Chin, the former Chief Justice of Malaysia, is no longer an issue as he has since retired. Any perseverance of this goal is now an exercise in futility. Let bygones be bygones.

On this score, it must be noted that the present Chief Justice, YAA Tan Sri Mohamed Dzaiddin bin Haji Abdullah, the Minister in the Prime Minister's Department, YB Dato' Dr Rais Yatim, and the President of the Bar Council, Tuan Haji Sulaiman bin Abdullah, have all voiced their hope that the new millennium will bring about a change. The joint effort of these three personalities must not go to waste. I now make this impassioned plea to both parties to hang up your gloves and enter the ring of peace.

The whole country is reverberating with the sound of the word 'unity'. It is axiomatic therefore that the Bar ought to lead by example. When I say the Bar, I include the plaintiff herein. Just about a year ago I was to hear the defamation suit filed by Mohammad Sabu (the then MP for Party PAS) and Ibrahim Ali from the UMNO, regarding a reference made by the latter in respect of a khalwat case. On the day fixed for hearing, and with the consent of both solicitors I talked with the plaintiff and the defendant and urged them to show the Nation that notwithstanding their different ideologies, they stood united as a race. The parties asked for a short adjournment and returned within half an hour to inform me that for the sake of Malay Unity the plaintiff was withdrawing his suit with no order as to costs. It was a spontaneous show of respect for each other which no doubt the media had then canvassed.

Then I had the occasion to hear yet another defamation suit whereby Mr Lim Kit Siang, the DAP stalwart and its former MP, sued YB Dato' Seri Lim Keng Yaik, the Minister of Primary Industries. Again on the morning of the hearing and with the consent of counsel for both parties, which included Mr Karpal Singh for Mr Lim Kit Siang, I spoke to both litigants of the need to show the country that the Lims were willing to forgive and forget and to show the Nation that for the sake of the community they were united. I was a happy Judge to have recorded a withdrawal of the suit with no order as to costs. The magnanimity of Mr Lim Kit Siang and the equal show of respect by the Minister were exemplary.

Yet again, the Secretary of the Malay Badminton Association of Malaysia (MBAM) sued four officers of its State branches in defamation. During one of the case management dates I was able to persuade both counsel to speak to their respective clients whether they were prepared to meet with the judge to resolve the matter. The said Secretary had sued the President of the Penang Branch of the MBAM and another official, the Secretary of the Negeri Sembilan MBAM, and the Secretary of the Kelantan Branch. Having fixed a convenient date to enable all parties to travel to Kuala Lumpur I was extremely pleased when after a short adjournment, the parties announced that the matter was settled in the interest of 'Malay Unity' (see *The Sun*/Saturday/ 2 September 2002 at p 6).

I am therefore now appealing to you, gentlemen of the Bar, to show this Nation and the world that you are willing to forgive and forget. You, the plaintiff, have won decisively the earlier suit and the decision of the High Court has been affirmed by the Court of Appeal and I understand that leave to appeal to the Federal Court has been refused. I understand you were

awarded generous costs all the way. I also ask that as a further show of your desire to put an end to this long drawn out trial, you would deem it fit to withdraw all existing suits against the Bar and the related parties.

You, the Bar, I ask that you do not let your fear of what has been decided by the courts as against you, to come in between a settlement. Do not reject the olive branch when offered. Do not think that your rights have been curtailed by the judgment of this court and the Court of Appeal and do not be tempted to use this case to resurrect the same issues. Be mindful too of the fact that in the event the highest court reaffirms the earlier decision in respect of the other case already decided, your doors to settlement would forever be shut. Instead let the matter rest. If, God forbid, there be another occasion for you to challenge the earlier decision, then so be it. But today, I urge you, be gracious in accepting the hand of friendship offered by the plaintiff. Accept him, if you will as the return of the Prodigal Son. Forgive him for the anguish and acrimony that have been caused.

I urge all parties to join hands to show this Nation and to the world that united we stand and divided we fall. Enemies of the Nation are ramming the portal gates of freedom. Let not the citizens be disunited, you the members of the Bar are the legal brains of the country. Your reasoning, tempered with patience, your understanding, laced with tolerance, must be the hallmark of your very own existence, you cannot be vindictive. You cannot set personal goals. You must act to benefit the Nation.

At a time when this country faces turmoil and tribulation both from within and without, the people look to you, the members of the Bar, for guidance. Be moderate, considerate, compassionate. May God bless you both in your deliberations.

Thank you.

This statement reflects a clear indication that the parties should resolve the differences between them. So, those representing the defendants went back to their masters: the members of the Bar. A general meeting was called. The unanimous view of the floor was that no compromise should be entered into. In the meantime, the plaintiff, no doubt influenced by the sentiments expressed by the learned judge, took a step in the action. He made an application by summons to discontinue the suit. That application came up for hearing before the learned judge. It was strenuously opposed by counsel appearing for the defendants. The learned judge, in a reserved judgment, permitted discontinuance and ordered each party to bear their own costs. The defendants have appealed to us.

In an argument advanced to us this morning, En Malik Imtiaz for the appellants neatly put his case on two grounds which we think we may conveniently summarise without doing any injustice to him. His primary argument is that the learned judge, although conferred with a wide discretion in the matter, exercised it wrongly, that is to say, for the wrong reasons and upon extraneous grounds. The second submission is that the discontinuance itself is an abuse of process of the court which ought not to have been entertained by the learned judge.

Responding to these arguments, Mr DP Vijandran submits that there is nothing extraordinary about what the learned judge did. His case is that

A there was no error in the way in which the learned judge exercised his discretion and that the only issue is confined to the terms on which the discontinuance ought to have been granted. And upon the latter issue there had been no argument from counsel who had appeared in the court below. Neither has it been a ground of appeal.

B So far as abuse of process is concerned, Mr Vijandran correctly pointed out that the Memorandum of Appeal does not raise this as a ground of complaint. Further, abuse of process has been used by the courts as a ground to strike out notices of discontinuance issued without the leave of the court. In any event, he says, no cogent evidence of collateral purpose has been placed on record.

C We perceive the facts of this appeal to lie upon the intersection of two important and fundamental principles of our adjectival law. The first is the right of the initiator of an action to withdraw the process by which he invoked the court's jurisdiction. The second is the undoubted right of a defendant to press his case forward to judgment especially where he considers himself to be *dominus litis*. As in all cases of such nature, where important opposing interests come into conflict, the lines of decision become blurred or at least are not entirely clear.

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So far as the present case is concerned, the issue resolves itself into one of discretion. It is encapsulated in O 21 r 3 of the Rules of the High Court 1980. That rule reads:

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> (1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.
>
> (2) An application for the grant of leave under this rule may be made by summons.

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G Counsel on both sides have rendered much assistance to us on the interpretation of this rule. We are grateful for that. What comes across clearly from the authorities that they have referred to is the fact that a judge exercising his power under O 21 r 3 which permits discontinuance has a wide discretion. But it is not an unprincipled discretion. There are important guidelines that act as beacons, guiding him through those blurred areas of which we spoke a moment ago.

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One of these guidelines is that if a defendant is dominus litis, the general rule is to refuse leave to discontinue. See *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124. Another guideline is that where the case is at a very advanced stage, care should be taken not to permit discontinuance. And what constitutes an advanced stage depends on the facts and

I circumstances of each case as illustrated by the case of *Fox v Star Newspaper Company* [1898] 1 QB 636. Another consideration; yet another guideline; which a judge ought to bear in mind is any interim or interlocutory

advantage that the plaintiff may have gained between the date of issue of the writ and the point of time which he seeks to discontinue: *O'Neal v Mann* [2000] FCA 1680. A

The upshot is that it all depends on the facts and circumstances of each case bearing in mind that one ought not to depart from the outer parameters established by the guidelines to which we have referred. B

Mr Vijandran submits that the general rule is that the plaintiff is to be permitted to discontinue the action which he has initiated. In the context of O 21 r 3, we would, with much respect, dissent from that submission. We do so for the reasons we have advanced thus far when discussing the guidelines which any judge should respect when exercising his discretion. C

We have said that it depends on the facts of each case. What about this case? Now, these are the considerations that present themselves on an objective analysis of the fact pattern.

First, the defendants in exercising their undoubted constitutional right of freedom of speech initiated the holding of a general meeting to discuss the affairs of the judiciary. Here we need not go into the question whether art 10 of the Federal Constitution prevails over art 127 or whether art 127 ought to be read in the restrictive fashion as suggested by En Malik Imtiaz during this morning's argument. Suffice to say that the defendants were exercising their bona fide constitutional right. As Lord Atkin observed in *Ambard v A-G for Trinidad & Tobago* [1936] AC 322, 'Justice is not a cloistered virtue' and we are certainly not prepared to say that the conduct of judges should never be discussed at a general meeting of the Bar. Woe beget the day that such a rule is handed down by this court. D E

The plaintiff undoubtedly exercising his legal rights took the opposite view. He went to court and obtained an interim injunction that halted the meeting. We must say a word here, which we did not mention when reciting the facts. There was an appeal preferred against the grant of interlocutory injunction which failed. An application to the Federal Court for leave to appeal also failed. In other words, the defendants were put to great expense and trouble to test the rights of the plaintiff/respondent to bring the action in the first place. They suffered an order of costs against them at every stage. They came back to the trial court and opposed the granting of the trial of the preliminary issue. They lost there as well. They fought on the facts and law at the trial of the preliminary issue tooth and nail. They never relented. To be then told after undergoing all this trouble that they are not entitled to have judgment delivered, not to know their ultimate fate, is in our view adding insult to serious injury. F G H

These are the relevant considerations which the learned judge ought to have taken into account when called upon to exercise his discretion in one way or the other. But he did not do that.

With respect, what the learned judge did was to take into account a policy consideration, namely that the hands at the helm of the judicial vessel had changed and that the issue was no longer available for discussion save at an academic level. That in our view is an irrelevant consideration. I

A We are here concerned with the legal and constitutional rights of ordinary litigants. In our view, there is nothing extraordinary or special in this case so far as the exercise of discretion under O 21 r 3 is concerned.

Mr Vijandran has correctly drawn our attention to a passage in the judgment of the case of *Wah Bee Construction Engineering v Pembenaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858. The role of this court in an appeal B on discretion was there summed up as follows (at p 874 of the judgment):

> We must say at once that the Rules of Court confer upon the High Court a wide discretion upon the question whether an action should be discontinued. The rules also confer upon the court a wide power in relation to the kind of orders it may make upon an application for leave.
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> C Now, it is settled law that in an appeal against the exercise of discretion by a judge, the initial function of this court is one of review only, there being no original discretion vested in this court. Only after an appellant is able to demonstrate to a conviction that this case comes within one or more of those categories of cases in which appellate interference is warranted does his court become entitled to exercise a discretion of its own.

D We take this opportunity to affirm that proposition. The initial function of this court is one of review only. But the appellants have demonstrated to a conviction that an error in the exercise of discretion has indeed occurred. This is therefore an appropriate case for us to intervene and exercise an original discretion of our own. We think that greater justice will be done if E a decision is delivered and the proceedings are permitted to run their ordinary course. At the end of the day, it is justice which is the overriding consideration. And justice is the master we all serve with humble obedience.

For the reasons already given, this appeal must succeed. The conclusion that we have arrived at therefore makes it unnecessary for us to go into the second argument advanced by En Malik Imtiaz namely, the issue F of abuse of process. But we must not be misunderstood to say that that argument has no merit. It is just that it is not necessary for us to deal with it.

The appeal is accordingly allowed. The orders of the leaned judge are set aside. The action is restored to file and is remitted to the learned judge for the delivery of decision on a date convenient to him. There is no G extraordinary reason why costs should not follow in the ordinary way. The respondent will therefore pay the appellants' costs here and in the court below in the matter of this application. This is unfortunate because the suggestion to discontinue came from the learned judge but we are bound by principle to exercise the discretion in the matter of costs in the ordinary way. The deposit is to be refunded to the appellants.

H Before we conclude, we must express our gratitude to counsel on both sides without whose able assistance, this ex tempore judgment would not have been possible.

Appeal allowed.

I Reported by Peter Ling